IN THE

Supreme Court of the United States

October Term, 1951.

No. 599.

LIONEL H. SANGER,

Petitioner,

vs.

THE PLOMB TOOL COMPANY, a corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The oral opinion of the District Court [R. 220-224] is unreported. The opinion of the Court of Appeals for the Ninth Circuit [R. 238-247] is reported at 193 F. 2d 260.

Jurisdiction.

The jurisdictional requisities are adequately set forth in the petition.

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Questions Presented.

1. Whether the Court of Appeals was correct in holding that under the facts of this case petitioner was an independent contractor and had not left "a position . . . in the employ of any employer" within the meaning of the reinstatement provisions of the Selective Training and Service Act of 1940, as amended.

2. Whether the decision of the Court of Appeals is not also supported by the following additional grounds which were urged before that court but were not passed upon by it:

(a) That respondent fully satisfied any obligation it may have had to petitioner by offering him "a position of like seniority, status and pay," within the meaning of the Act.

(b) That petitioner's claims for reinstatement and damages were barred by the applicable statute of limitations and by laches and delay.

Statute Involved.

The pertinent provisions of the Selective Training and Service Act of 1940, as amended, are set forth in the Petition at pages 2-3.

Statement of the Case.

Respondent, The Plomb Tool Company, is a California corporation engaged in the business of manufacturing and selling hand tools and related items. [Find. II, R. 12.]

In November, 1942 and for approximately nine years prior thereto petitioner was authorized to sell respondent's

merchandise on a commission basis as a manufacturer's representative in a specified territory referred to generally as the "Kansas City territory." [Find. III, R. 12.]

Immediately prior to petitioner's entry into the armed forces in November, 1942 he was operating under a written agreement with respondent, executed in January, 1941, as amended, which was terminable upon thirty days' written notice by either party and which provided that it should not be "construed to create any relationship of employer and employee." [Exs. 15, 16 and 19, R. 47, 48, 50.] Although as pointed out in the Petition (p. 4), a prior contract in 1938 designated petitioner as "salesman" [Ex. 7, R. 40], and a 1939 contract designated him as a "representative" to sell respondent's products "as an independent contractor" [Ex. 8, R. 41], the relationship was the same during the entire time petitioner was connected with the company [R. 166-167].

Petitioner represented six other manufacturers in addition to respondent, likewise selling their products as a manufacturer's representative on a commission basis. During 1941 and 1942, petitioner received 43% of his income ($20,244.49 out of a total of $46,316.65) from the six other manufacturers. [Pre-trial Stipulation, Ex. 50, par. 6(b) and 6(c), R. 17, which stipulation is printed as Appendix A to this brief for the convenience of the Court; Exs. J and K, R. 89-91; Ex. Q, R. 17, 100.]

Petitioner paid all his own expenses (averaging about $200 per week during 1941 and 1942) incurred in selling

respondent's products and those of the six other manufacturers, with the exception of $30 which respondent paid petitioner in partial reimbursement of his expenses in attending an automotive service industry convention, and $200 which respondent paid for the initial repairs and tires for a display truck which respondent made available to petitioner. [Pre-trial Stip., App. A, par. 6(d); Exs. J and K, R. 89-91.] Thereafter, petitioner paid all expenses of operating the display truck. [R. 77.]

Petitioner hired and paid with his own funds one assistant who was chosen by him and acted pursuant to his directions. [Pre-trial Stip., App. A., par. 6(d); R. 75.]

In the conduct of his business as a manufacturers' representative, petitioner chose his own customers and determined his own itineraries. He was requested by respondent to make reports concerning his itineraries and calls, but he did not follow any regular reporting plan as requested. Respondent from time to time furnished him with names of prospective customers in his territory from whom respondent received inquiries, and petitioner reported to respondent regarding the same. [Pre-trial Stip., App. A, par. 6(e).]

Respondent did not furnish petitioner with an office and did not pay or reimburse him for any office expense. [Pre-trial Stip., App. A, par. 6(a).] Petitioner furnished his own Cadillac automobile which he used in his business, taking depreciation on it in his personal income tax returns. [Exs. J and K, R. 89-91.]

No deductions from petitioner's commissions were made on account of social security taxes, old age benefits or unemployment insurance [R. 212-213; Pre-trial Stip., App. A, par. 6(f).] Respondent had the final authority on extension of credit to customers, and in specific instances from time to time respondent requested petitioner to report to it upon his activities in collecting past-due accounts. [Pre-trial Stip., App. A, par. 6(h).]

In a letter written by respondent's president at petitioner's request recommending petitioner for a commission in the Navy, petitioner was referred to as having been "district manager" for the company. [Ex. 22, R. 52-53, 181.] Respondent awarded petitioner service pins which were given to anyone, regardless of status, having more than two years of connection with the company, including directors of the corporation. [R. 46, 176-177.]

In his federal income tax returns, petitioner variously described the nature of his business as "manufacturers' agent" and as "manufacturers' representative," listing his income received from the several manufacturers represented by him and lumping together all his deductible business expenses. [Exs. J-O, R. 89-94.] His business stationery had printed at the top "Lionel H. Sanger," his Kansas City address and telephone, and at the bottom was the printed legend "Serving the Automotive and Industrial Jobber"; it bore no reference to respondent. [Ex. H, R. 83-84.]

In 1942 respondent declined petitioner's request that it seek draft deferment for him, stating that it could not do so because petitioner was an independent contractor. [Ex. 21, R. 52.] In November, 1942 petitioner entered the Navy.

He was honorably discharged in November, 1945. [Find. IV, R. 13.] In January, 1946, he applied to respondent for renewal of his pre-war status as a manufacturer's representative. [R. 122, 177.]

Prior to this application, respondent had determined that employment of full-time salesmen (as distinguished from manufacturers' representatives handling numerous lines) was necessary [R. 119, 120, 130]. This stemmed from customer resistance to such manufacturers' representatives and from the increase in the number of items manufactured by respondent, in the number of its customers and in the volume of its sales [R. 168-170]. Further, respondent had revised the geographic limits of its sales territories, reducing to some extent the area of petitioner's former "Kansas City territory." [R. 147, 152-153.] At that time the sales of respondent's products in the reduced Kansas City territory were being handled by three full-time salesmen employed by respondent. [R. 123, 124, 128, 157, 187.]

When petitioner applied for reinstatement in January, 1946, respondent advised him that in its view he had been an independent contractor and hence had no statutory right to reinstatement. [R. 142, 151-152, 217.]

Nevertheless, because it respected petitioner's ability as a salesman [R. 143, 152, 217], respondent offered him a position as a full-time employee in charge of his former "Kansas City territory" (as such territory had been revised to that date) selling exclusively the products of respondent and its subsidiary corporations, and replacing the man who had taken that position when petitioner entered the Navy, upon the identical terms then applicable to that man. [Pre-trial Stip., App. A, par. 10; R. 123-124, 129, 133, 148, 186-187, 211.] He was informed that it would be necessary for him to work for respondent exclusively and to cease to represent other manufacturers as he had done prior to the war. [Pre-trial Stip., App. A, par, 10; R. 122-124, 129, 133, 148, 186-187, 211.]

Although somewhat reduced in area, that territory then produced a far greater volume of business than it yielded in 1942 when petitioner left the company [R. 154, 158, 194-195, Ex. S]; and during 1946, the position so offered petitioner yielded earnings greatly in excess of petitioner's pre-war annual earnings from all sources. [Exs. 48-49, R. 111, 206-210; Ex. Q, R. 100.]

Petitioner refused to accept the offered position, stating that he was unwilling to give up his representation of other manufacturers. [R. 123, 131-132; Pre-trial Stip., App. A, par. 11.]

In March, 1946, petitioner consulted the Selective Service System regarding his claim for reinstatement. [Find. VII, R. 13.] The case was transferred from California

to the United States Attorney in Chicago (where petitioner resided), who did not file suit to enforce the claim and who turned the file over to petitioner in February, 1948. [Find. IX, R. 14.] Petitioner then employed private counsel, and after correspondence with respondent's attorneys, this action was filed on September 22, 1949, more than three years and seven months after respondent's initial refusal to reinstate petitioner in his pre-war status as a manufacturer's representative. [Find. X-XIII, R. 14-15.]

From January 1, 1946 to November 30, 1950, petitioner received over $116,000 from ten different firms for services rendered in the sale of their products. [Find. XVI, R. 17; Ex. Q, R. 100.]

The District Court ordered respondent to reinstate petitioner as a full-time employee in charge of the "Kansas City territory" for one year, and awarded him damages in the amount of $102,185.25.[1] [Judgment, R. 20-21.]

The Court of Appeals reversed this judgment on the ground that the findings of fact did not support the District Court's conclusion that petitioner held "a position . . . in the employ" of respondent and was not an independent contractor. [R. 245-247, 248.]

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[1]It is respondent's position, as argued in the Court of Appeals, that the relief awarded petitioner by the District Court was excessive as a matter of law. [See R. 229-230.]

ARGUMENT.

The Decision of the Court of Appeals Turns on an Analysis of Particular Facts and Does Not Involve an Important Question of Federal Law.

The Court of Appeals' opinion makes it clear that this case involves only the measuring of particular facts against the statute involved and settled principles of law. By guaranteeing reinstatement only to a veteran who has left "a position . . . in the employ of any employer," the Selective Service Act excludes from its coverage all independent contractors.[2] This statutory language thus required the Court of Appeals to determine whether petitioner was an independent contractor under the principles laid down by the Supreme Court and lower federal courts for determining the existence of such a status. Consequently, the Court of Appeals reviewed the facts in detail and concluded that they showed that petitioner was an independent contractor. [R. 245-246.]

The factual nature of the Court of Appeals' decision could hardly be more emphatically demonstrated than by the following statement from the opinion:

> "When the *facts of the instant case,* as stated in the District Court's Findings of Fact, and in the (adopted) stipulation of the parties *are set off against the criteria set forth hereinbefore,* and as suggested by a long line of cases, they call for the conclusion that appellee was not an employee of appellant, but rather an independent contractor. . . . . *The facts of this case* fail to reveal any

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[2]As we will show later, this is the unanimous view of all the courts which have considered this problem.

> of the supervision, control and direction that attaches to the employer-employee relationship." [R. 245; emphasis added.]

This quotation leaves no doubt but that the importance of the decision below is confined to the parties litigant and that it can affect others only in the rare instances where their particular contractual or factual relations happen to be similar. Moreover, it is also evident that this Court could review this decision only by going deep into the full record to determine whether the Court of Appeals properly applied settled principles to the unique facts of this one particular case.

Contrary to petitioner's claim (p. 2), it thus appears that the question presented in this case is far narrower and of much less general importance than whether any traveling salesman paid by commissions is entitled to reinstatement under the Selective Service Act. While it is true that petitioner was paid by commissions, it was also stipulated by the parties and found by the District Court that he was a manufacturers' representative who sold not only respondent's products but also those of six other manufacturers from whom he derived 43% of his income, that he paid his own expenses and the salary of an assistant whom he chose and directed, and that he chose his own customers and determined his own itineraries [Pre-trial Stip., App. A, par. 6; Find. XVII, R. 17]. Only after a careful analysis of these and the other facts of this particular record did the Court of Appeals hold that petitioner was an independent contractor and not an employee.

Properly viewed, the Petition for Certiorari in this case falls squarely within the principle that, "Granting of

the Writ [of certiorari] would not be warranted merely to review the evidence or the inferences drawn from it." *General Pictures Co. v. Electric Co.,* 304 U. S. 175, 178; see *Labor Board v. Waterman S. S. Co.,* 309 U. S. 206, 208. In line with this principle, Chief Justices Hughes[3] and Vinson[4] have emphasized that the Court does not review cases which relate solely to particular contracts or transactions or which turn upon the facts of the particular case. Applied here, this salutary principle would seem to require a refusal by this Court to accede to petitioner's request that it review the special and unique facts of this case.

There Is No Conflict of Decisions.

Careful examination of the cases cited by petitioner indicates that the asserted conflict of decisions does not exist. As in *Wisconsin Electric Co. v. Dumore Co.,* "the asserted conflict in decisions arises from differences in states of fact, and not in the application of a principle of law." 282 U. S. 813. The "contrariety in result" referred to by petitioner (p. 8) arises because the determination as to whether the plaintiff in each case was an independent contractor turns upon an analysis of

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[3]Chief Justice Hughes told the American Law Institute that, ". . . we find a very large proportion of the applications are without substantial grounds . . . for example, we have many applications where the questions raised are those relating to particular contracts or transactions and turn upon the facts of particular cases, and there is no controversy with respect to legal principles." 20 A. B. A. J. 341 (1934).

[4]Chief Justice Vinson told the American Bar Association that, "To remain effective the Court must continue to decide only those which present questions whose resolution will have particular importance beyond the particular facts and parties involved." St. Louis Daily Record, Sept. 8, 1949, P. 1, Col. 7.

the particular facts involved, and often upon a construction of particular contracts. In short, every case asserted by petitioner to create a conflict is distinguishable on the facts, as we shall presently show.

Kay v. General Cable Corporation (3 Cir. 1944), 144 F. 2d 652, which petitioner asserts is in conflict with the decision in this case, was the first Court of Appeals case to consider the question of reinstatement for independent contractors. Although it considered the phrase "a position . . . in the employ of any employer" to make the Act inapplicable to independent contractors (144 F. 2d at 654), the court went on to hold that the company doctor or "medical director" in that case was not an independent contractor and was entitled to reinstatement. It based that holding on the distinguishable facts that the doctor was paid a salary for specific hours of service each day in addition to being on call by the company at any time for injuries to employees (although he maintained some private practice in addition to his company duties), and that the company furnished all equipment and facilities, chose and paid his nurses and assistants, made deductions from his salary for social security and unemployment compensation, sought draft deferment for him as a regular employee, and had the right to discharge him at any time.

Likewise distinguishable on its facts is *Heller v. Inter-Boro Savings & Loan Assn.* (3 Cir. 1948), 166 F. 2d 83, in which the same Court of Appeals affirmed *per curiam* a district court decision (12 C. C. H. Labor Cases, par. 63,744). There the court granted reinstatement to an attorney engaged as solicitor for a loan company who was paid a specified flat fee for each mortgage loan handled by him in return for attending annual and

monthly meetings, for rendering general legal advice at all times upon request, and for drafting the necessary documents and handling all legal aspects of each loan made by the company.

The asserted conflict with *King v. Southwestern Greyhound Lines* (10 Cir. 1948), 169 F. 2d 497, cert. den. 335 U. S. 891, likewise disappears upon examination. After specifically recognizing that independent contractors are not covered by the Act, the court held that the contract gave defendants complete control over the details of plaintiff's operation of a bus depot and hence that plaintiff was an employee despite the provision of the contract that he was to be an independent contractor. Far from being inconsistent, the holding of the Court of Appeals for the Tenth Circuit that the effect of the contract was controlling over the nomenclature used therein is in accord with the Ninth Circuit's decision in this case. [R. 246.]

Nor is there conflict with the earlier Ninth Circuit decision in *Williams v. Dodds* (1947), 163 F. 2d 724. There the court tacitly recognized that independent contractors were not protected by the Act, but held that a manager of a taxicab business, who received fifty per cent of the gross profits as compensation and who was subject to discharge at will, was entitled to reinstatement. Each of the three district court decisions cited in that case recognized the inapplicability of the Act to independent contractors, but decided on the particular facts that the plaintiff involved did not fall in that category. *Karas v. Klein* (D. Minn. 1947), 70 Fed. Supp. 469, involving a rubbish hauler; *MacMillan v. Montecito Country Club* (S. D. Calif. 1946), 65 Fed. Supp. 240, involving a golf professional; *Lee v. Remington Rand*

(S. D. Calif. 1946), 68 Fed. Supp. 837, involving a typewriter salesman.[5]

It is noteworthy that the Courts of Appeal are completely unaware of any such conflict between their decisions as petitioner claims to find. Thus the Ninth Circuit in *Brown v. Luster* (1947), 165 F. 2d 181, which petitioner states is in accord with the decision below, cites with approval the Third Circuit decision in *Kay v. General Cable Corporation, supra,* which petitioner says is "directly in conflict." Conversely, the Tenth Circuit in *King v. Southwestern Greyhound Lines, supra,* cites and relies on *Brown v. Luster* for the proposition that independent contractors are outside the ambit of the Act. And in *Hudspeth v. Esso* (1948), 170 F. 2d 418, which petitioner refers to as supporting the decision below, the Eighth Circuit cites approvingly both *Kay v. General Cable Corporation* and *Brown v. Luster.*

Another group of cases which petitioner claims are in conflict with the decision below are the decisions of this Court applying the "economic reality" test in differentiating between employees and independent contractors under other social legislation (p. 8). As indicated below, these asserted conflicts are no more substantial than those discussed earlier.

In *United States v. Silk* (decided with *Harrison v. Greyvan Lines*), 331 U. S. 704, at 713, this Court called

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[5]The rule that independent contractors are not covered by the Act was recognized in the only two other decisions cited in petitioner's "tabular digest of cases" (Petition, App. A) where that issue was raised and decided in favor of the plaintiff. *Travis v. Schwartz Mfg. Co.* (E. D. Wisc. 1951), 20 C. C. H. Labor Cases par. 66, 501; *Meyers v. Barenberg* (D. Md. 1946), 68 Fed. Supp. 697, affirmed (4 Cir. 1947), 161 F. 2d 850 (without reference to independent contractor question).

attention to its rejection of the "power of control" test as the sole criterion for determining the coverage of the National Labor Relations Act (in *Labor Board v. Hearst Publications*, 322 U. S. 111) and to its conclusion that for such purposes " 'employees' included workers who were such as a matter of economic reality." In considering the coverage of the Social Security Act, this Court went on to say:

> ". . . degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation are important for decision. No one is controlling nor is the list complete . . ." (331 U. S. at 716.)

Similar tests were applied by this Court in holding the meat-boners in *Rutherford Food Corp. v. McComb*, 331 U. S. 722, to be employees within the meaning of the Fair Labor Standards Act. The Court also noted that an "independent contractor" label in the contract is not controlling where the work done follows the usual path of an employee (331 U. S. at 729).

Far from being in conflict with the above cases, the decision below specifically applied the criteria therein set forth. The Court of Appeals quoted the tests outlined in the *Silk* case and measured the facts against them. [R. 244-245.] In full compliance with the *Rutherford Food Corp.* case, the Court of Appeals gave no undue emphasis to the independent contractor nomenclature used in the written contract between petitioner and respondent [Exs. 15, 16, R. 47, 48], for it pointed out that the *legal effect* of the relationship, as determined from the facts found by the District Court, accented the legal accuracy of the chosen phraseology [R. 246].

We do not understand petitioner to urge that independent contractors are within the purview of the Act or that there is a conflict of decisions in that regard. Out of an excess of caution, however, it is pointed out that every Court of Appeals and every District Court to which the question has been presented (and there have been many) have held that independent contractors are not covered by the Act. The sum of the matter is that the federal courts are in agreement on the principles of law to apply in this type of case and that the "contrariety of results" is produced solely by the application of these principles to particular and different facts.

The Decision Below is Correct in Holding That Petitioner Was an Independent Contractor and Therefore Not Within the Coverage of the Act.

As already pointed out, every court which has considered the question has decided that independent contractors are not within the coverage of the Selective Service Act.[6] This unanimity of decision, which dates back to the 1944 decision of the Third Circuit in *Kay v. General Cable Corporation*, 144 F. 2d 653, would appear to be compelled by the unequivocal language of the Act limiting its coverage to veterans who have left "a position . . . in the employ of any employer."

There is no merit in petitioner's strained attempt [pp. 8-9] to find some comforting negative implication in the recent amendments restricting the coverage of the Labor-Management Relations Act and the Social Security Act

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[6]None of the decisions cited in petitioners "tabular digest of cases" (Petition, App. A) casts the slightest doubt on this principle.

and in the lack of a comparable amendment to the Selective Service Act. On the contrary, the fact that Congress has not attempted either to broaden or to restrict the coverage of the Selective Service Act or to change its provisions upon its reenactment into the Universal Military Training and Service Act indicates a satisfaction with the course of judicial decision under the Act for the past eight years.

In determining whether petitioner was an independent contractor, the decision below correctly applied the criteria set forth in the *Silk* and *Rutherford Food Corp.* cases and in the veterans' reinstatement cases. Like the truckers in the *Silk* case, petitioner here conducted his own business "Serving the Automotive and Industrial Jobber" [see Ex. H, R. 83-84]; he paid his own expenses with minor exceptions [Pre-trial Stip., App. A, par. 6(d)]; he hired and paid his own assistant [R. 73-74]; he sold products not only for respondent, but also for six other manufacturers [Pre-trial Stip. App. A, par. 6(b)]; he owned his own automobile which he used in his traveling [Exs. J-O]; and he depended upon his own initiative, judgment and energy for a large part of his success.

As a matter of "economic reality," petitioner was not dependent upon respondent for his regular livelihood, for not only did he derive more than 43% of his pre-war income from other sources, but in 1946 and 1947 after he returned from service he earned substantially more from his other pre-war lines, excluding that of respondent, than he had earned from respondent plus the others in 1941 and 1942. [Find. XVI, R. 17, Ex. Q.] Viewing the total situation, the Court of Appeals correctly concluded that petitioner was an independent contractor and was therefore in no position to benefit by the Act.

The correctness of the decision below is further supported (as petitioner concedes, p. 7) by the following Court of Appeals cases:

In the Ninth Circuit case of *Brown v. Luster* (1947), 165 F. 2d 181, the facts were strikingly similar to those in the case at bar. There the plaintiff was a furniture salesman who operated in a specified territory under an oral agreement which was terminable at will by either party, who was paid by commissions, who was free to select his own customers and determine his own hours of work and itineraries, who paid all his own expenses and who was free to represent other manufacturers (although he had not done so for some time). The court denied reinstatement, holding that the plaintiff was an independent contractor.

In *Rosenbaum v. Ceco Steel Products Corporation*, 172 F. 2d 33, the Court of Appeals for the District of Columbia affirmed *per curiam* a district court decision (84 Fed. Supp. 954) reaching a similar result on similar facts. There the veteran, like petitioner here, was a sales representative authorized to operate in a specified territory and paid on commission basis. He paid his own expenses including the compensation of his assistants, handled the sale of other products in addition to those of the defendant and was free to determine his own hours of work and itineraries and to solicit orders in whatever manner and from whatever customers he chose. To the same effect is *Frank v. Tru-Vue, Inc.* (S. D. Ill. 1946), 65 Fed. Supp. 220.

In *Hudspeth v. Esso Standard Oil Co.* (8 Cir. 1948), 170 F. 2d 418, it was held that the operator of a bulk plant for the sale and distribution of petroleum products

under lease from defendant and pursuant to an agreement whereby he handled such products as consignee of defendant, hiring and paying his assistants and bearing all other expenses of the operation, was an independent contractor and hence not entitled to reinstatement.

Two Alternative Grounds Support the Court of Appeals' Decision

In view of its conclusion that petitioner was an independent contractor, the Court of Appeals did not consider other grounds for reversal which were urged by respondent in that court and any one of which is sufficient to support the decision. These additional grounds are as follows:

1. Respondent Fully Satisfied Any Obligation It May Have Had to Petitioner by Offering Him "a Position of Like Seniority, Status and Pay."

Section 308(b), subdivision (B) of the Selective Service Act gives the employer the alternative of restoring the veteran either to his pre-war position or to "a position of like seniority, status and pay." *Schwetzler v. Midwest Dairy Products Corporation* (7 Cir. 1949), 174 F. 2d 612. Thus the Act does not require the freezing of an employer's operations regardless of economic circumstances in order to preserve to the veteran his exact pre-war position. The veteran must take the position as he finds it upon his return from the service so long as he is treated equally with contemporary employees who did not join the armed services. He is not entitled to "super-seniority." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 285-286; *Aeronautical District Lodge 727 v. Campbell*, 337 U. S. 521, 526; *Schreier v. M. H. Fishman Co., Inc.* (3 Cir. 1948), 176 F. 2d 722, 726.

Despite its belief that petitioner had no rights under the Act, respondent considered him to be a good salesman and offered him the current counterpart of his exact pre-war job. [R. 143, 152-217:] Had petitioner accepted that position, he would have replaced the man then in charge of the "Kansas City territory," as then constituted, who had succeeded to that position upon petitioner's entry into the Navy. His terms of employment as to commissions, territory and duties would have been identical to those applicable to the man he replaced. [Pre-Trial Stip., App. A, par. 10; R. 123-124, 129, 148, 186-187.] Although somewhat reduced in area, the territory offered to petitioner had produced in 1945 three times the dollar volume of business that it yielded in 1942 when petitioner left the company, and it accounted for a considerably greater percentage of respondent's total sales than it had in 1941 and 1942. [R. 154, 158, 194-195, Ex. S.] During 1946 the position so offered petitioner yielded earnings of approximately $39,500 [Exs. 48 and 49, R. 111, 206-210], as compared with petitioner's average annual earnings in 1941 and 1942 of approximately $12,500 from respondent and $22,200 from all sources [Ex. Q, R. 100].

It was a condition of the offer that petitioner would have to give up his other lines and give his full time to the company, as did the man currently in charge of the territory. The reason for this condition was that the substantial growth in the volume of respondent's sales and in the number of its customers, as well as adverse reaction of customers against manufacturers' representatives handling numerous lines, had combined to dictate the substitution of full-time salesmen for such representatives. [R. 119, 120, 130, 168-170.]

Petitioner refused to accept the offer and insisted upon continuing his representation of other manufacturers. [R. 122-124, 129, 133, 148, 186-187, 211.] In the circumstances, petitioner's insistence upon reinstatement in his *exact* pre-war position was unreasonable, for his freedom to represent others would necessarily disrupt respondent's selling methods and organization. Petitioner's rejection of this offer of the post-war counterpart of his former position—clearly "a position of like seniority, status and pay"—put an end to any obligation respondent may have had under the Act.

2. Petitioner's Claims for Reinstatement and Damages Are Barred by the Statute of Limitations.

The Selective Service Act prescribes no limitation period within which rights thereby conferred must be asserted. In these circumstances the appropriate statute of limitations of the state in which the action is brought is applicable under the Federal Rules of Decision Act. (*Campbell v. City of Haverhill,* 155 U. S. 610; *Chattanooga Foundry & Pipe Works v. Atlanta,* 203 U. S. 390.) As amended in 1948 [28 U. S. C. §1652], to apply "in civil actions" rather than only in actions "at common law," the Rules of Decision Act now compels the application of state limitations statutes in equitable actions for the enforcement of federal statutory right. *Cf. Holmberg v. Armbrecht,* 327 U. S. 392. The appropriate state statute of limitations is Section 338, subdivision 1, of the California Code of Civil Procedure, which provides a three-year limitation period for "an action upon a liability created by statute, other than a penalty or forfeiture." This statute has been specifically applied by the courts of California to claims for reinstatement based upon state statutes.

Jones v. Board of Police Commissioners, 141 Cal. 96, 74 Pac. 696; *Harby v. Board of Education,* 2 Cal. App. 418, 83 Pac. 1081. Since this action was commenced more than three years and seven months after the claim accrued by virtue of respondent's refusal to reinstate petitioner in January, 1946, the action is barred by the statute.[7]

Conclusion.

For the foregoing reasons the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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[7]Even before the 1948 amendment of the Rules of Decision Act [28 U. S. C. §1652] when federal coutrs were not bound by state statutes of limitation in purely equitable actions to enforce federal rights, federal courts used the state limitation period (here three years) as a guide in applying the doctrine of laches. *Russell v. Todd,* 209 U. S. 280, 293. Hence, even if not barred by the statute of limitations, the action is barred by petitioner's laches and delay for more than three years and seven months before filing this action. See *Cummings v. Hubbell* (W. D. Pa. 1948), 76 Fed. Supp. 453; *Daniels v. Barfield* (E. D. Pa. 1948), 77 Fed. Supp. 283; *Caldwell v. Harman* (S. D. Calif. 1947), 12 C. C. H. Labor Cases, par. 63,671.